

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
JUDGE

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

September 6, 2011

David C. Bethard, Jr.  
28350 Cherokee Ave.  
Millsboro, DE 19966

**RE:   *David C. Bethard, Jr. v. Attorney General's Office, et al.,*  
      C.A. No. S11C-08-001 ESB  
      Letter Opinion**

Dear Mr. Bethard:

On August 1, 2011, David C. Bethard, Jr. ("Bethard") filed a complaint listing in the caption the following defendants: the Attorney General's Office, Troop 4 of the Delaware State Police, the State of Delaware and Captain Charles Simpson ("Simpson"). However, in the body of the complaint, he asserts a negligence claim against Simpson only and seeks damages for personal injuries he suffered when Simpson shot him during a domestic dispute after Bethard threatened to provoke what is commonly referred to as "suicide by cop".<sup>1</sup> Bethard also has filed a motion to proceed *in forma pauperis*. This is my decision granting the motion to proceed *in forma pauperis* but dismissing the complaint after undertaking the statutorily-required review.

---

<sup>1</sup>The trial testimony in the criminal case of *State v. Bethard*, Def. ID# 0908001389, contained undisputed testimony from three witnesses that Bethard threatened to commit suicide by cop. Transcript of February 24, 2010, Trial Proceedings at B-17; B-82; B-84; B-101; B-115-116.

I first review the motion to proceed *in forma pauperis* and the affidavit submitted in connection therewith. Bethard is indigent and consequently, the Court **grants** the motion and allows him to proceed *in forma pauperis*.

However, the granting of the motion does not mean that the action automatically proceeds. Instead, 10 *Del. C.* § 8803 requires the Court to review the complaint to determine whether the complaint is legally or factually frivolous or if it is malicious. If it is any of these things, then the action will not proceed. In undertaking this review, the Court keeps in mind that Bethard is *pro se*. As the Superior Court recently explained:

Also, when appropriate, this Court will hold a *pro se* Plaintiff's complaint to a less demanding standard of review. However, "there is no different set of rules for *pro se* plaintiffs," and this Court will accommodate *pro se* litigants only to the extent that such leniency does not affect the substantive rights of the parties. [Footnotes and citations omitted.]

*Anderson v. Tingle*, Del. Super., C.A. No. 11C-04-027, Cooch, R.J. (Aug. 15, 2011) at 5.

Before reviewing the complaint, it is helpful to set forth the events occurring on August 2, 2009, upon which Bethard bases this complaint. I do so by quoting from the Supreme Court's recitation of evidence presented at the criminal trial against Bethard. In *Bethard v. State*, 12 A.3d 1153, \_\_ (Del. 2011), the following appears:

On August 2, 2009, David Bethard got into an argument with his wife, Cherry Esslinger. The argument escalated and Bethard eventually went to the kitchen, retrieved several kitchen knives, and began striking them on his arm in an attempt to injure himself. In the process, he told Esslinger that he was going to have the police hurt him in front of her so that she would have to see it and then live with the experience.

During the argument, Esslinger's daughter, Tiffany Fithian, and her boyfriend, Gary Call, returned home. According to Esslinger, Bethard began threatening all of them with a knife and he began "ranting and raving about something that just didn't make any sense," while continuing to say that he was going to get hurt. Fithian asked Bethard to leave the house and threatened to call the police.

Eventually, Esslinger left the house with Bethard in order to defuse the situation. They drove away from the house. When Esslinger attempted to get out of the car at a stoplight on Route 1, Bethard kept driving in order to prevent her from getting out. As they continued driving, they continued arguing. When Bethard stopped the car at a stop sign, Esslinger managed to get out of the car and run away. Bethard pursued her, and after he caught her, they continued arguing in a random front yard on Retz Lane until Delaware State Police Captain Charles Simpson arrived.

Simpson testified that he received a text message alerting him to an armed kidnapping in progress, and he responded to the notification. Simpson, a 30-year police veteran who was off-duty at the time, saw Bethard and Esslinger in the Retz Lane front yard as he drove up the street in an unmarked vehicle. After Simpson stopped his car and got out, Esslinger approached him. According to Simpson's testimony, she told him, "He [Bethard] kidnapped me. He said he was going to kill me. He has a weapon." Esslinger testified that she never said that to Simpson, but instead told him that Bethard was unarmed and suicidal.

After Esslinger approached Simpson, Bethard continued walking around the yard with his hand in his pocket. Simpson testified that, with his gun drawn, he told Bethard to take his hand out of his pocket, raise his hands in the air, and get on his knees. According to Simpson, Bethard responded by refusing to comply and stating, "That's not going to happen today. It's absolutely not going to happen today." Simpson repeated the orders, and Bethard repeated his statements. Bethard then began to approach Simpson with his hand still in his pocket. Bethard told Simpson, "I have something for you, and I'm going to bring it to you." According to Simpson, when Bethard was about six to eight feet away, he said to Simpson, "Here I come. I told you, I got it for you and this is it." At that point, according to Simpson, Bethard turned his back toward Simpson and then turned back to face him, lunged at him, and pulled his hand quickly from his pocket holding a "dark object." Simpson shot him with a single bullet. Simpson testified that at the time he fired, he believed that Bethard had a weapon and that he had one last chance to do something to protect himself. The "weapon" turned out to be Bethard's cell phone.

Bethard was charged with numerous crimes stemming from these events of August 2, 2009. A trial was held. On February 25, 2010, a jury found Bethard not guilty of some charges but guilty of a number of charges. Those pertinent charges of which it found him guilty are aggravated menacing<sup>2</sup> and resisting arrest. The jury found that each of the following elements of

---

<sup>2</sup>According to 11 *Del. C.* § 602(b), "[a] person is guilty of aggravated menacing when by displaying what appears to be a deadly weapon that person intentionally places another person in fear of imminent physical injury."

aggravated menacing were established beyond a reasonable doubt: Bethard displayed what appeared to be a deadly weapon to Simpson and placed Simpson in fear of imminent physical injury and Bethard acted intentionally, that is, with a conscious objective or purpose to place Simpson in fear of imminent physical injury by displaying what appeared to be a deadly weapon. The jury, in finding Bethard guilty of resisting arrest, found the following elements were established beyond a reasonable doubt: that Bethard attempted to prevent a peace officer, in this case, Simpson, from effecting an arrest or detention.

Bethard appealed the Superior Court's denial of his motion for judgment of acquittal on the charge of aggravated menacing. *Bethard v. State, supra*. He asserted that insufficient evidence supported that charge, contending that although Simpson may have had a subjective belief that Bethard had a weapon, Bethard never objectively produced a weapon during their altercation. The Supreme Court reviewed, *de novo*, the Superior Court's denial of the motion for judgment of acquittal, and specifically determined "whether any rational trier of fact, after considering the evidence in the light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt." *Id. (quoting Winer v. State, 950 A.2d 642, 646 (Del. 2008))*. The Supreme Court ruled that the Superior Court correctly denied the motion for judgment of acquittal because Simpson's testimony established (1) his subjective belief that Bethard was armed and (2) an objective manifestation of a weapon.

The Supreme Court's review of the testimony and its decision follow.

The testimony establishes Simpson's subjective belief that Bethard possessed a weapon. Also, Bethard's decision to conceal his hand in his pocket and then lunge at Simpson from six to eight feet away while withdrawing a "dark object" quickly from his pocket constituted an objective physical manifestation of a deadly weapon. It is immaterial that Simpson's testimony is, in part, contradicted

by other witnesses' testimony because the trier of fact is "the sole judge of credibility of the witnesses and is responsible for resolving conflicts in the testimony."<sup>10</sup> More importantly, when facing a motion for a judgment of acquittal, a trial judge must consider the evidence in the light most favorable to the State.

10 *Knight v. State*, 690 A.2d 929, 932 (Del. 1996).

\*\*\* Here, the trial judge articulated the subjective prong and, whether he appropriately articulated the objective prong or not, the record provides sufficient evidence of an objective physical manifestation for the trial judge appropriately to deny the motion for judgment of acquittal.

*Bethard v. State, supra.*

The criminal trial resulted in the establishment of facts which Bethard cannot relitigate due to the doctrine of collateral estoppel. *Murrey v. Shank*, 2011 WL 1415023, \*1 (Del. Super. April 13, 2011); *Keystone Insurance Co. v. Walls*, 2006 WL 1149143, \*7 (Del. Super. Jan. 31, 2006); *Spry v. Adkins*, 1994 WL 164602 (Del. Super. April 5, 1994), *aff'd*, 653 A.2d 305, 1994 WL 716015 (Del. Dec. 16, 1994) (TABLE). In other words, the following facts are set in stone and Bethard must use these facts in any complaint he makes based on those events: Simpson subjectively believed that Bethard possessed a weapon. Bethard concealed his hand, then lunged at Simpson while withdrawing a "dark object". Bethard's actions put Simpson in fear of imminent physical injury and Bethard acted intentionally, that is, with a conscious objective or purpose to place Simpson in fear of imminent physical injury by displaying what appeared to be a deadly weapon. Finally, Bethard attempted to prevent Simpson, a peace officer, from effecting an arrest or detention.

I now turn to a review of the complaint.

The entire complaint reads as follows:

On August 2, 2009, my self [sic] Plaintiff David C. Bethard Jr. and my wife

Cherry Esslinger were standing in front of 34429 Retz Lane Lewes DE 19958 having an argument [sic] when Defendant Charles J. Simpson pulled up in an [sic] Dodge Durango. Exited the vehicle pointing a 357 handgun at me telling me to get on the ground. I asked him who he was. He responded dont [sic] worry about who I am just get on the ground. I asked him several times who he was, he responded with the same answer. I started walking away from him. I stopped I looked to my right a man Charles Underbueler (witness [sic]) He was looking out the window. I heard sirens. I looked to my left then Charles J. Simpson shot me in the abdomen. Plaintiff David C. Bethard was unarmed did not approach Defendant Charles J. Simpson in an aggressive matter [sic] what so ever. There was no weapon recovered from me. He was in an unmarked vehicle wearing street clothes. Never had a badge or Idityification [sic] or Identified [sic] him self as a police officer. As a result I sustaining [sic] multiple injuries. as a direct resultt [sic] of Defendants [sic] negligence the plaintiff David C. Bethard suffered severe personal injuries, both of temporary and permanent nature, fractured pelvis, fractured hip, repaired bladder, continues to experience substantial physical pain and discomfort and suffering emotional pain posttrumatic [sic] symptoms, anxiety and nervousness, medical Bills for treatment of the injuries. The amount Im [sic] sueing [sic] for is \$3,000,000 Dollars [sic] for medical and pain and suffering.

The facts Bethard sets forth misrepresent what happened that day and attempt to assert that Simpson shot him for no reason. Those facts are contrary to the legally established facts and consequently, the complaint is factually frivolous.

Furthermore, the State Tort Claims Act, 10 *Del. C.* § 4001, provides Simpson, who was acting in his official capacity as a police officer, with a qualified immunity.<sup>3</sup> Bethard was

---

<sup>3</sup>Therein, it is provided:

Except as otherwise provided by the Constitutions or laws of the United States or of the State, as the same may expressly require or be interpreted as requiring by a court of competent jurisdiction, no claim or cause of action shall arise, and no judgment, damages, penalties, costs or other money entitlement shall be awarded or assessed against the State or any public officer or employee, including the members of any board, commission, conservation district or agency of the State, whether elected or appointed, and whether now or previously serving as such, in any civil suit or proceeding at law or in equity, or before any administrative tribunal, where the following elements are present:

(1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, the

required to make specific factual allegations in the complaint establishing that one or more of the elements of this qualified immunity did not apply. *Proctor v. Sullivan*, 788 A.2d 132, 2001 WL 1287031 (Del. Oct. 18, 2011) (TABLE); *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990); *Vick v. Haller*, 522 A.2d 865, 1987 WL 36716, \*3 (Del. March 2, 1987) (TABLE); *Lee v. Johnson*, 1996 WL 944868 (Del. Super. June 4, 1996). Bethard did not allege facts showing Simpson's actions constituted gross negligence or were motivated by bad faith. In fact, his only allegations were that Simpson's actions were negligent. The qualified immunity precludes this suit.

In another situation, the Court could provide a plaintiff with the opportunity to amend his complaint to determine if he can make the required assertions. *See Cornish v. Delaware State Police*, 1995 WL 413415 (Del. Super. June 2, 1995). However, as has been established earlier, the doctrine of collateral estoppel binds Bethard to certain facts. He legally cannot advance any

---

interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over whom the public officer, employee or member shall have supervisory authority;

(2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and

(3) The act or omission complained of was done without gross or wanton negligence;

provided that the immunity of judges, the Attorney General and Deputy Attorneys General, and members of the General Assembly shall, as to all civil claims or causes of action founded upon an act or omission arising out of the performance of an official duty, be absolute; provided further that in any civil action or proceeding against the State or a public officer, employee or member of the State, the plaintiff shall have the burden of proving the absence of 1 or more of the elements of immunity as set forth in this section.

facts showing that Simpson shot him for no reason or shot him in bad faith. Bethard cannot, at this point, allege facts which would establish that Simpson's actions constituted gross negligence or were motivated by bad faith. Bethard purposefully set out to provoke a police officer into shooting him so that he could emotionally harm his wife and step-daughter. This complaint against this police officer is frivolous both factually and legally and Bethard can make no claims to render it otherwise. There is no point in allowing Bethard to amend his complaint. Thus, the complaint is **dismissed** with prejudice.

Bethard has not asserted any allegations against the Attorney General's Office, Troop 4 of the Delaware State Police, and the State of Delaware. Consequently, the action is **dismissed** as to those named defendants.

In conclusion, the Court, while granting the motion to proceed *in forma pauperis*, dismisses the complaint with prejudice.

**IT IS SO ORDERED.**

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

cc: Prothonotary's Office  
W. Michael Tupman, Esquire